

DENNIS J. HERRERA, State Bar #139669
City Attorney
ELIZABETH SALVESON, State Bar #83788
Chief Labor Attorney
MARGARET W. BAUMGARTNER, State Bar #151762
ADELMISE R. WARNER, State Bar #215385
Deputy City Attorneys
Fox Plaza
1390 Market Street, Floor No. 5
San Francisco, California 94102-5408
Telephone: (415) 554-3959
Facsimile: (415) 554-4248

Attorneys For Defendants
CITY AND COUNTY OF SAN FRANCISCO ET AL.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CLIFFORD COOK,

Plaintiff,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, ANTONIO FLORES,
DON SLOAN, MARSHA ASHE, and
DOES 1-50, inclusive,

Defendants.

Case No. C 07 2569 CRB

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION FOR
PARTIAL SUMMARY JUDGMENT;
AND OPPOSITION TO MOTION TO
CONTINUE**

Date: Feb. 22, 2008

Time: 10:00 a.m.

Place: Courtroom 8, 19th Fl.

Date action filed: May 15, 2007

Trial date: None set

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	1
I. THE COURT SHOULD DENY COOK'S REQUEST FOR A CONTINUANCE BASED ON FEDERAL RULE OF CIVIL PROCEDURE 56(F).....	1
A. The District Attorney's Statements Do Not Create an Inference That Captain Ashe Arrested Cook Based on His Race	2
B. Because Captain Ashe Decided to Arrest Cook Prior to or During Inspector Flores's Meeting With the District Attorney, What Occurred at the Meeting is Irrelevant	4
C. Cook Makes an Insufficient Showing That He Requires Additional Discovery Regarding the Department's Usual Practices Related to its Interactions With the District Attorney's Office	5
II. COOK FAILS TO PROVIDE ANY EVIDENCE OF RACE DISCRIMINATION	6
A. The Undisputed Facts Show That Captain Ashe Arrested Cook Based on Her Assessment That Cook May Further Injure His Wife, Not Because of His Race	7
B. Captain Ashe's Refusal to Allow Cook to Make a Formal Statement Following His Arrest Does Not Raise an Inference That Ashe Arrested Him Because of His Race	8
C. No Final Policy Maker Ratified Any Discriminatory Conduct and Therefore Cook's <i>Monell</i> Claim Fails	9
D. Lt. Sloan and Inspector Flores Did Not Arrest Cook and Therefore Did not Deprive Him of a Constitutional Right.....	10
III. ALTERNATIVELY, ALL INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

Federal Cases

<i>American Federation of State, County & Municipal Employees, AFL-CIO v. Washington</i> 770 F.2d 1401 (9 th Cir. 1985)	6
<i>Burrell v. McIlroy</i> 464 F.3d 853 n.2 (9 th Cir. 2005)	7
<i>Employers Teamsters Local No. 175 v. The Clorox Company</i> 353 F.3d 1125 (9 th Cir. 2004)	2
<i>Gay v. Waiters' and Diary Lunchmen's Union</i> 694 F.2d 531 (9 th Cir. 1982)	6, 8
<i>Monell v. Department of Social Services</i> 436 U.S. 658 (1978).....	9, 10
<i>Pembaur v. City of Cincinnati</i> 475 U.S. 469 (1986).....	9
<i>Saucier v. Katz</i> 533 U.S. 194 (2001).....	10
<i>St. Louis v. Praprotnik</i> 485 U.S. 112 (1988).....	10
<i>United States Investment Co. of Los Angeles, Inc. v. GTE Mobilnet, Inc.</i> 281 F.3d 929 (9 th Cir. 2002)	1
<i>Wayte v. United States</i> 470 U.S. 598 (1985).....	6

Federal Statutes

42 United States Code § 1983	9, 10
Federal Rule of Civil Procedure § 56(f)	1, 5

INTRODUCTION

Captain Marsha Ashe of the San Francisco Police Department arrested Inspector Clifford Cook, a member of the Department, for domestic violence and for unauthorized use of the Department's protected criminal history databases. Cook sued the City alleging, among other things, that the Department arrested him based on his race. Cook does not allege that any officer made any race-based remarks, but attempts to infer racial discrimination based solely on his view of how the Department should have responded to his wife's domestic violence allegations. The City has moved for partial summary judgment on this claim.

In addition to providing argument in opposition to the City's motion, Cook also requests a continuance under Federal Rule of Civil Procedure 56(f) to obtain additional discovery. The City addresses both the request for continuance and Cook's arguments in opposition to the motion in this reply.

The Court should deny Cook's motion to continue because he fails to carry his burden under Rule 56(f) to show that he could not obtain "essential" evidence. The court should grant the City's motion for summary judgment because Cook cannot present any facts upon which a reasonable trier of fact could conclude that Captain Ashe arrested him because of his race.

ARGUMENT

I. THE COURT SHOULD DENY COOK'S REQUEST FOR A CONTINUANCE BASED ON FEDERAL RULE OF CIVIL PROCEDURE 56(F)

Rule 56(f) states:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] that the party cannot for reasons stated present by affidavit facts *essential* to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Fed. Rule of Civ. Proc. 56(f) (emphasis added).

The party seeking additional time to develop its opposition bears the burden of showing that such relief is warranted. See *United States Investment Co. of Los Angeles, Inc. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 939 (9th Cir. 2002). Moreover, the moving party must proffer facts showing

1 "that the information sought actually exists." *Employers Teamsters Local Nos. 175 and 505*
 2 *Pension Trust Fund v. The Clorox Company*, 353 F.3d 1125, 1129 (9th Cir. 2004)

3 The discovery that Cook claims that he requires to defeat summary judgment relates only to
 4 three facts: (1) What the DA said in a meeting prior to Cook's arrest; (2) whether Captain Ashe
 5 knew of that discussion prior to arresting Cook; and (3) the Department's regular practices regarding
 6 arrests of domestic violence suspects. Even if we assume that the facts are as Cook apparently
 7 hopes they will be, such evidence would not defeat summary judgment. First, these facts have little
 8 or no bearing on and raise no inference regarding the only issue here: Did Captain Ashe arrest
 9 Cook because of his race? Second, even if Cook can elicit additional information regarding the
 10 meeting with the DA, the uncontroverted evidence shows that Captain Ashe decided to arrest Cook
 11 before that meeting, and would have taken the same action even if she knew what happened at that
 12 meeting. What the DA said therefore is irrelevant to her motivation. Lastly, even if Cook shows
 13 that the Department failed to follow its usual practices regarding the arrest of domestic violence
 14 suspects, the undisputed facts show that Cook's status as a police officer removed this case from the
 15 usual circumstances. Therefore any deviation from the Department's "usual practices" is not
 16 relevant and fails to raise any inference of race discrimination.

17 Because the evidence sought by Cook will not change the result, the Court should deny the
 18 motion to continue.

19 **A. The District Attorney's Statements Do Not Create an Inference That Captain**
 20 **Ashe Arrested Cook Based on His Race**

21 Cook requests a continuance in order to depose Assistant District Attorney Elizabeth
 22 Aguilar-Tarchi, Lieutenant Don Sloan, and Inspector Antonio Flores regarding what occurred at the
 23 morning meeting on July 27, 2005, with ADA Aguilar-Tarchi and what part of that conversation, if
 24 any, was conveyed to Captain Ashe before Cook's arrest. But even if the Court assumes that the
 25 evidence will show what Cook claims it will show, such evidence does not raise an inference of
 26 racial discrimination.

27 Importantly, Cook continues to use an ambiguous phrase to describe what the DA, according
 28 to him, decided at the morning meeting on July 27, 2005. He states that at that meeting the DA

1 informed Inspector Flores that she "declined to prosecute." What Cook describes with this phrase,
 2 however, is the DA's determination that she would not be willing to file criminal charges absent
 3 additional investigation. (See Cook Dec. ¶ 15, Ex. A ("I believe this memo [requesting further
 4 investigation] confirms what was told by Ms. Aguilar-Tarchi to Inspectors Flores and Ciardella on
 5 the morning of July 27th".) But requesting additional investigation is not the same as "declining to
 6 prosecute" or "discharging" the case. The DA "declines to prosecute" or "discharges" a case only
 7 after the Department arrests a suspect and the Inspectors present a "rebooking" package to the
 8 District Attorney. (See Ashe Depo. pp. 99:12-20; 105:21-106:18.)¹

9 In this case, the uncontradicted evidence shows that the DA discharged the case two months
 10 after Cook's arrest, and after additional investigation by both the Police Department and a DA
 11 investigator. (Cook Depo. Ex. 12; pp. 99:16-23.) Therefore, a more accurate description of Cook's
 12 allegation is that in the morning of July 27, 2005, the DA indicated that the Department should
 13 conduct additional investigation before the DA would file criminal charges.

14 For the purposes of the City's motion for partial summary judgment, the City will not
 15 dispute that fact. Cook therefore has no need to depose anyone, including ADA Aguilar-Tarchi, to
 16 obtain further proof of that allegation.

17 If Cook is attempting to argue that ADA Aguilar-Tarchi told the Department that she
 18 intended to discharge the case, i.e., dismiss it outright, Cook has not carried his burden of showing
 19 that such evidence may actually exist. All of the evidence shows that, if anything, ADA Aguilar-

21 ¹ Cook's attorney specifically asked Captain Ashe what she meant when she used the phrase
 22 "decline to prosecute":

23 Q: When you used the term 'decline to prosecute,' what did you mean by
 24 that?

25 A: I meant the same thing I meant with discharging a case. The standard for
 26 an arrest is different, and certainly much lower, than the standard of proof in
 27 a criminal case. And it's the District Attorney's Office, after the arrest is
 28 made, who has the responsibility to review cases for the likelihood of a
 conviction.

Ashe Depo. p. 99:12-20.

1 Tarchi stated more investigation would be necessary before she would charge the case. The court
2 should therefore deny Cook's request for a continuance.

3 **B. Because Captain Ashe Decided to Arrest Cook Prior to or During Inspector**
4 **Flores's Meeting With the District Attorney, What Occurred at the Meeting is**
5 **Irrelevant**

6 Cook also requests a continuance in order to depose Lieutenant Sloan and Inspector Flores
7 regarding "communications" between them and Captain Ashe regarding the meeting with the DA.
8 But any communications between them are irrelevant to any material fact in this case.

9 The only issue in this motion is whether Captain Ashe arrested Cook because of his race.
10 Captain Ashe testified that she attended a meeting at 9:30 a.m. on the morning of July 27, 2005, at
11 which time she, in conjunction with Deputy Chief Tabak, made the decision to arrest Cook. (Ashe
12 Depo. p. 177:17-23.) They discussed, but rejected, the possibility of waiting to determine whether
13 or not the DA would issue a warrant. (Ashe Depo. pp. 119:1-24; 179:14-180:2.) However, the
14 arrest did not occur immediately, because Captain Ashe learned that Inspector Cook was gone and
15 out of the building that morning, and therefore they waited until he returned. (Ashe Depo.
16 p. 118:20-23.)

17 Captain Ashe knew when she decided to arrest Cook that Inspector Flores would at some
18 point be meeting with the District Attorney's office to discuss this case, but she did not know when
19 that meeting would occur. (Ashe Depo. p. 123:9-21.) She also testified that no one told her prior to
20 Cook's arrest that the DA stated that she would not charge the case without further investigation.
21 (Ashe Depo p. 124:17-25.) But, she also testified that even if she had learned of any such
22 conversation, it would not have made any difference to her decision. (Ashe Depo. p. 126:7-22.)
23 She would have arrested Cook anyway because she believed that the Department "had the legal and
24 ethical responsibility to make an arrest in this case" and because "this case is predicated on physical
25 evidence, escalating violence, as reported by the victim, and lethality factors, that suggested this
26 could easily be a domestic violence homicide." (Ashe Depo. p. 126:7-22.)

27 Thus, the DA's decision did not and could not have an affect on Captain Ashe's motivation
28 to arrest Cook. Captain Ashe not only had already made up her mind, she would have made the
same decision even if she knew the DA's position on the matter. As Captain Ashe stated, the

1 "District Attorney doesn't approve our arrests." (Ashe Depo. p. 101:18-19.) Thus, whether or not
 2 the DA said additional investigation would be necessary, or whether or not Lt. Sloan or Inspector
 3 Flores told Captain Ashe about the DA's view, raises no inference regarding Captain Ashe's
 4 motivation for arresting Cook.

5 The court should therefore deny Cook's motion to continue to under Rule 56(f).

6 **C. Cook Makes an Insufficient Showing That He Requires Additional Discovery**
 7 **Regarding the Department's Usual Practices Related to its Interactions With**
 8 **the District Attorney's Office**

9 Cook's attorney's declaration states that he requires additional discovery related to "common
 10 practices and procedures relating to the way these agencies coordinate their efforts [sic] to arrest
 11 and prosecute suspects." (Scott Dec. ¶ 3.) But Cook already had a number of sources of such
 12 information. He deposed Captain Ashe, and asked a lot of questions regarding arresting DV
 13 suspects. Captain Ashe explained the process in detail. (See e.g., Ashe Depo. pp. 50-56.) In
 14 addition, Cook himself provided a declaration stating what he believes to be the common practice.
 15 (Cook Dec. ¶¶ 3-7.) Cook also could have presented declarations from many other inspectors, with
 16 whom he has daily contact, regarding what they believe to be these common practices. For
 17 example, Cook claims to be friends with a domestic violence "expert," Leroy Lindo, who could
 18 have provided a declaration. (Cook Depo. pp. 110:1-8.)

19 Moreover, there does not appear to be a lot of dispute regarding the usual procedures for DV
 20 arrests. But it is also undisputed that this is not a "common" case. Unlike most DV cases, the
 21 police did not make the arrest at the scene, because the Department received the report, through
 22 unusual channels, a week after it occurred. (Cook Depo. Ex. 7; Ashe Depo. pp. 100:10-13; 105:12-
 23 106:18.) The suspect was a member of the Department, which caused the Department to be more
 24 "proactive." (Ashe Depo. p. 112:3-15.) His status as a police officer created a higher risk of
 25 potential violence. (Ashe Dec. ¶¶ 6-7.) Captain Ashe's arrest of Cook is the only arrest she
 26 conducted in her four years as the Captain of the DV unit. (Ashe Depo. p. 166:9-17.) Here, the
 27 Department did not follow its "normal" or "common" practices because it was not a "normal" or
 28 "common" case. Discovery concerning those practices would therefore be irrelevant to this matter.

1 Because Cook has failed to show that he was unable to obtain any "essential," much less
2 relevant, evidence, the Court should deny his motion for a continuance.

3 **II. COOK FAILS TO PROVIDE ANY EVIDENCE OF RACE DISCRIMINATION**

4 Although a plaintiff may prove a discriminatory motive through circumstantial evidence, the
5 plaintiff must present facts "from which one can infer, if such actions remain unexplained, that it is
6 more likely than not" that the defendant's conduct was racially motivated. *Gay v. Waiters' and*
7 *Diary Lunchmen's Union*, 694 F.2d 531, 546 (9th Cir. 1982); see also *American Federation of State,*
8 *County & Municipal Employees, AFL-CIO v. Washington*, 770 F.2d 1401, 1406 (9th Cir. 1985)
9 ("discriminatory intent may be inferred from the actions of an employer where experience has
10 proved that in the absence of any other explanation it is more likely than not that those actions were
11 bottomed on impermissible considerations.") Moreover, it is not enough that the defendant knew
12 that its enforcement procedures could affect one group more than others. Rather a plaintiff must
13 prove that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part
14 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Wayte v. United*
15 *States*, 470 U.S. 598, 607-08 (1985). And, in cases such as these, challenging discretionary
16 enforcement decisions are "particularly ill-suited to judicial review." (*Id.*) The number of different
17 factors that enter into the decision "are not readily susceptible to the kind of analysis the courts are
18 competent to undertake." (*Id.*)

19 In this case, to prevail on his Equal Protection claim related to his arrest, Cook would have
20 to prove that chose to arrest him because of, not in spite of, his race. To avoid summary judgment,
21 he must present facts, not speculation "from which one can infer, if such actions remain
22 unexplained, that it is more likely than not" that the defendant's conduct was racially motivated.
23 *Gay v. Waiters' and Diary Lunchmen's Union*, 694 F.2d 531, 546 (9th Cir. 1982). Here, the City has
24 provided legitimate non-discriminatory reasons for all of its action. Cook provides no evidence that
25 these reasons are pretextual.

26 The Court should therefore grant the City's partial motion for summary judgment on this
27 claim.
28

A. The Undisputed Facts Show That Captain Ashe Arrested Cook Based on Her Assessment That Cook May Further Injure His Wife, Not Because of His Race

The material facts, absent speculation, are as follows: the Department received a report of domestic violence perpetrated by one of its sworn officers. (Ashe Dec. Ex. 2.) The Department investigated the report. (Ashe Dec. Ex. 1.) The Department obtained a statement from the victim, and corroborating evidence of her statement in the form of photos and personal observation of her injuries and corroboration of a DV report by the medical center. (Ashe Dec. Exs. 1, 2.) The Department also corroborated the victim's statement that Cook, without authorization and in violation of the law, had accessed restricted criminal history databases to run checks on her. (Ashe Dec. Ex. 1, p. 9.) The Department also obtained corroboration of Lisa Cook's report that she and Cook had been involved in prior domestic violence incidents in other jurisdictions. (Ashe Dec. Ex. 1, p. 4; Ex. 2, p. 1.)

One of the Department investigators conveyed the information about this case to his superior officer, and the Commanding Officer of the Domestic Violence unit, Captain Ashe. (Ashe Dec. ¶ 4.)² After obtaining the report of the facts uncovered by the Department's investigation as of the morning on July 27, 2005, and discussing it with other members of the command staff, Captain Ashe decided to perform a custodial arrest of Cook. (Ashe Dec. ¶ 5.)

Captain Ashe decided to arrest Cook rather than wait for a warrant because of her belief, based on what she knew at that time, that Cook's history and the circumstances of the most recent domestic violence incident as reported by Lisa Cook suggested that Cook may further harm his wife. (Ashe Dec. ¶ 5-7.) She believed that arresting him could place an additional barrier to further violence. (Ashe Dec. ¶ 8.)

Cook attempts to obscure these facts through speculation regarding what he believes *should* have occurred. Even though he admits to probable cause, he believes that Captain Ashe should have sought the permission of the District Attorney's office to arrest him. He believes that Captain

² In his opposition Cook seems to suggest that Captain Ashe improperly relied on the report of Lt. Sloan. But officers often make decisions based on reports of other officers. See *Burrell v. McIlroy*, 464 F.3d 853, 857 n.2 (9th Cir. 2005).

Ashe should have determined what happened in the meeting with the District Attorney's office. He believes that, if the DA told the investigators that more investigation would be required before she charged the case, the Police Department should not have arrested him. Cook's concludes that "the most obvious explanation" for Ashe's failure to do these things is Cook's race, and that of his wife.

Captain Ashe, however, approached this matter in the way she did for legitimate, non-discriminatory reasons. Cook is a police officer. He carries a gun. Captain Ashe only became involved in this case because he is a police officer. (Ashe Depo. p. 112:3-15.) Lisa Cook's allegations that Cook "knew judges" and could make her "bones disappear," carried more weight because he is a police officer. (See Ashe Dec. Ex. 1, pp. 8-9; Ex. 2, p. 4.) In its investigation, the Department found evidence that Cook had already abused his power as a police officer through illegal use of resources available to police officer, but not the general public. (Cook Depo. Ex. 1, p. 9.) And, because he is a police officer, the Department knew that its actions in this case would be heavily scrutinized. (Ashe Dec. ¶ 6.) Thus, the "most obvious explanation" for any differential treatment is not Cook's race, but his status as a police officer, which creates circumstances different from those of a standard domestic violence investigation.

These legitimate, non-discriminatory reasons for the Department's actions eliminate any inference of race-based animus on the part of Captain Ashe or any other defendant. Therefore, to defeat summary judgment, Cook must provide some evidence that could prove that this explanation is a pretext for discrimination. *Gay v. Waiters' and Diary Lunchmen's Union*, 694 F.2d 531, 546 (9th Cir. 1982). The only "facts" upon which Cook relies is what may or may not have occurred in a meeting with the District Attorney at which Ashe was not present and which occurred *after* Ashe made her decision to arrest Cook, and Ashe's refusal *after* she arrested him to allow him to make a statement. These facts do not suffice to show pretext.

B. Captain Ashe's Refusal to Allow Cook to Make a Formal Statement Following His Arrest Does Not Raise an Inference That Ashe Arrested Him Because of His Race

Cook's reliance on Captain Ashe's refusal to take a formal statement from him as proof of race discrimination is misplaced. Cook did not make his request to make a statement, and Captain Ashe did not refuse it, until *after* Captain Ashe placed Cook under arrest. (Cook Depo. p. 29:7-30-

17; 33:2-10.) Steve Johnson, Cook's representative, appears to have been confused about this: he indicates in his declaration that he requested that Cook be given the opportunity to make a statement "to avoid arrest," and "before a final decision to arrest him" had been made. (Johnson Dec. ¶¶ 2-4.) But by that time, Captain Ashe had already placed Cook under arrest. (See Cook Depo. pp. 29:15-31:22. (Johnson did not arrive until after Ashe placed him under arrest).)

Moreover, Captain Ashe did not want to take a statement from Cook because she was concerned that it was not in his best interest, and because she did not believe that it would aid her in her case. (Ashe Dec. ¶ 13.) Even Steve Johnson, the POA representative, states in his declaration that "If arrested I knew that Inspector Cook would be represented by an attorney. In anticipated that his attorney would advise him not to talk to investigators." (Johnson Dec. ¶ 4.) Thus, declining Cook's offer to make a statement has a legitimate, non-discriminatory reason, supported by Cook's own declarant, and does not raise an inference of racial discrimination.

C. No Final Policy Maker Ratified Any Discriminatory Conduct and Therefore Cook's *Monell* Claim Fails

Being the final decision maker is not the same as being the final policy maker. Otherwise, any final action on the part of any level of employee of a municipal agency would create *Monell* liability. "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, ... *Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts 'of the municipality' -- that is, acts which the municipality has officially sanctioned or ordered." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). It is only when "policy . . . , whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*

Here, Cook fails to provide any evidence that the City and County of San Francisco or the San Francisco Police Department has a policy or custom to arrest African-American men married to Caucasian women on the basis of race. He also does not have any evidence that any person involved in the arrest here is the final decision maker for making arrest policy for the City.

1 Cook relies entirely on his argument that by suspending him, the Chief of Police ratified
 2 racial discrimination. Cook's argument misconstrues the concept of ratification under *Monell*. The
 3 only unconstitutional conduct Cook alleges is Ashe's alleged racial motivation in arresting him. But
 4 she had probable cause to arrest him. Even if we assume that Chief Fong: (1) is a final policy
 5 maker; and (2) knew of Cook's arrest at the time and failed to intervene, nothing suggests that Chief
 6 Fong knew or could have known that Captain Ashe was motivated by unconstitutional animus.
 7 Therefore, no evidence supports a finding that Chief Fong intentionally ratified an equal protection
 8 violation. See *St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) ("if the authorized policymakers
 9 approve a subordinate's decision *and the basis for it*, their ratification would be chargeable to the
 10 municipality because their decision is final") (emphasis added).

11 **D. Lt. Sloan and Inspector Flores Did Not Arrest Cook and Therefore Did not**
 12 **Deprive Him of a Constitutional Right**

13 To be held liable under 42 USC § 1983, a defendant must intentionally act in a manner that
 14 results in the deprivation of an unconstitutional right. See *Saucier v. Katz*, 533 U.S. 194, 201
 15 (2001). Cook here attempts to avoid the dismissal of Inspector Flores and Lieutenant Sloan on the
 16 ground that they did not file declarations, and based on the unsupported assertion that they
 17 "participated" in Cook's arrest. But they do not need to file declarations because the undisputed
 18 facts show that Captain Ashe, not Lieutenant Sloan or Inspector Flores, made the decision to arrest
 19 Cook, and placed her under arrest. Captain Ashe and Cook both so testified. (Ashe Depo. p.
 20 177:17-23; Cook Depo. p. 33:2-10.) As the commanding officer of the unit, it is her job to make
 21 difficult decisions, and she did so. (Ashe Depo. p. 167:1-11.)

22 No evidence suggests either that that Sloan or Flores deprived Cook of a constitutional right,
 23 nor took any action with the intent of discriminating against Cook on the basis of his race. Also, no
 24 evidence suggests that they knew that Captain Ashe may be motivated by race. The Court should
 25 dismiss these two defendants.

26 **III. ALTERNATIVELY, ALL INDIVIDUAL DEFENDANTS ARE ENTITLED TO**
 27 **QUALIFIED IMMUNITY**

28 For the same reasons that the court should grant summary judgment to the three individual
 defendants, the three individual defendants would be entitled to qualified immunity. In particular,

1 even if the court were somehow to find that Cook can survive summary judgment on his case
2 against Captain Ashe, reasonable officers in Lt. Sloan and Inspector Flores's positions would not
3 have known that their actions would result in the deprivation of any clearly defined constitutional
4 right.

5 Because Cook's allegations against the three individual defendants are based solely on
6 Cook's arrest, they should be dismissed in their entirety.

7 **CONCLUSION**

8 For the foregoing reasons, the Court should grant the City's motion for partial summary
9 judgment on Cook's Second Cause of Action.

10 Dated: February 8, 2008

DENNIS J. HERRERA

11 City Attorney
12 ELIZABETH SALVESON
13 Chief Labor Attorney
14 MARGARET W. BAUMGARTNER
Deputy City Attorneys

15 By: /s/ Margaret W. Baumgartner
16 MARGARET W. BAUMGARTNER
17 Attorneys for Defendants CITY AND
18 COUNTY OF SAN FRANCISCO et al.
19
20
21
22
23
24
25
26
27
28